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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

LINDA JEAN TILLOTSON,

Defendant and Appellant.

G040445

(Super. Ct. No. 04CF1522 consol.  
with Nos. 03WF1702 & 04CF1557)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County,  
Janice M. McIntyre, Judge. (Retired judge of the Riverside Super. Ct. assigned by the  
Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed in part and remanded  
with directions.

Jean Matulis, under appointment by the Court of Appeal, for Defendant and  
Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant  
Attorney General, Gary W. Schons, Assistant Attorney General, Jeffrey J. Koch, Deputy  
Attorney General, for Plaintiff and Respondent.

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## INTRODUCTION

In *People v. Tillotson* (2007) 157 Cal.App.4th 517, we reversed in part and affirmed in part a judgment of conviction against Linda Jean Tillotson, and remanded for further proceedings, including resentencing. In this appeal, Tillotson raises four issues regarding sentencing after remand, namely, whether (1) the trial court erred by imposing and staying sentence on one of the two three-year enhancements ordered stricken in *People v. Tillotson*; (2) the trial court's imposition of consecutive terms violated Tillotson's rights under the Sixth Amendment to the United States Constitution; (3) the trial court erred in deferring presentence custody credit calculation to the Department of Corrections and Rehabilitation; and (4) the abstract of judgment must be corrected to reflect an aggregate jail sentence of 180 days rather than 270 days.

We agree with Tillotson on issues one and three. On issue two, we conclude imposition of consecutive sentences did not violate Tillotson's rights under the Sixth Amendment. On issue four, the trial court on remand may clarify its intended sentence. Accordingly, we remand for purposes described in the Disposition, but in all other respects, affirm.

## BACKGROUND

A jury convicted Tillotson of two counts of possession of a controlled substance for sale (counts 1 & 24), two counts of possession of controlled substance paraphernalia (counts 2 & 21), one count of possession of 28.5 grams or less of marijuana (count 3), one count of possession of a controlled substance (count 20), three counts of computer access and fraud (counts 4-6), one count of computer access and fraud with injury (count 7), four counts of identity theft (counts 8, 9, 13, & 22), and one count of disobeying a court order (count 23). The trial court found true the enhancement charged on counts 4, 5, 20, 22, and 24 that Tillotson committed the crimes while released from custody on bail. The trial court, using count 1 as the principal term, sentenced Tillotson to a total prison term of 14 years four months.

In *People v. Tillotson*, *supra*, 157 Cal.App.4th 517, we reversed in part, affirmed in part, and remanded. The Disposition stated:

“The judgment is affirmed in all respects except as follows.

“1. The trial court is directed to modify the judgment as to count 23 to reflect a conviction for an attempted violation of Penal Code section 166, subdivision (a)(4). As modified, the judgment as to count 23 is affirmed except as to sentencing. The matter is remanded for resentencing on count 23.

“2. The judgment as to count 4 is reversed and the matter remanded for a new trial.

“3. The three-year enhancement pursuant to Health and Safety Code section 11370.2, subdivision (c) is stricken on count 24.

“4. The matter is remanded on counts 5, 20, 22, and 24 for a determination and findings on whether the sentences on those counts are to run consecutively to each other or consecutively to the sentence on count 1 but concurrent to each other.” (*People v. Tillotson*, *supra*, 157 Cal.App.4th at pp. 547-548.)

Following remand, the trial court granted the prosecution’s motion to dismiss count 4 and resentenced Tillotson to an aggregate term of 10 years eight months in prison. Tillotson appealed.

## DISCUSSION

### I. *Striking Enhancement on Count 24*

In *People v. Tillotson*, *supra*, 157 Cal.App.4th at page 524, we concluded: “The trial court erred by imposing two three-year enhancements under Health and Safety Code section 11370.2, subdivision (c)—one on count 1 and the other on count 24.” The Disposition directed the trial court to strike the three-year enhancement imposed on count 24. (*Id.* at p. 548.) After remand, the trial court acknowledged the enhancement was “entered in error” but stayed punishment on the enhancement rather than striking it.

The enhancement under Health and Safety Code section 11370.2, subdivision (c) must be stricken, not stayed, as to count 24. Our disposition again will direct the trial court to strike the three-year enhancement under Health and Safety Code section 11370.2, subdivision (c) on count 24.<sup>1</sup>

## II. *Consecutive Sentences on Counts 5, 20, 22, and 24*

The trial court initially imposed consecutive sentences on counts 5, 20, 22, and 24, stating only ““a consecutive sentence is required by law.”” (*People v. Tillotson, supra*, 157 Cal.App.4th at p. 545.) We concluded the trial court must state reasons for imposing consecutive sentences, and therefore reversed the imposition of consecutive sentences on counts 5, 20, 22, and 24. (*Ibid.*) We remanded for the trial court to exercise its discretion in deciding whether to impose consecutive or concurrent sentences, and to state reasons if imposing consecutive sentences. (*Ibid.*)

After remand, the trial court again imposed consecutive sentences on counts 5, 20, 22, and 24, and made these findings: “[T]hese crimes and their objectives were predominantly independent of each other and committed on different days several months apart.” Tillotson argues, pursuant to *Blakely v. Washington* (2004) 542 U.S. 296 and *Apprendi v. New Jersey* (2000) 530 U.S. 466, the trial court erred in imposing consecutive sentences based on facts not found true beyond a reasonable doubt by a jury.

In *Oregon v. Ice* (2009) 555 U.S. \_\_\_, \_\_\_ [129 S.Ct. 711, 714-715], the United States Supreme Court concluded an Oregon statute giving a trial court discretion to impose consecutive sentences based on facts not found true beyond a reasonable doubt by a jury did not violate a defendant’s Sixth Amendment right to trial by jury. The court reasoned the Sixth Amendment, as construed in *Apprendi v. New Jersey* and *Blakely v. Washington*, did not extend to the determination whether to impose consecutive

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<sup>1</sup> Tillotson acknowledges the trial court’s failure to strike the enhancement “is not likely to increase the actual length of appellant’s sentence, it may affect her for prison classification purposes and therefore it is important that it be corrected.”

sentences: “There is no encroachment here by the judge upon facts historically found by the jury, nor any threat to the jury’s domain as a bulwark at trial between the State and the accused.” (*Oregon v. Ice*, *supra*, 555 U.S. at p. \_\_ [129 S.Ct. at p. 718.]

Tillotson filed her opening brief in this appeal before *Oregon v. Ice* was issued. She states in that brief she raises the consecutive sentencing issue “to preserve it pending the High Court’s decision in *Ice*.” As Tillotson acknowledges, California law is substantially similar to the Oregon statute upheld in *Oregon v. Ice*.

In this case, the trial court imposed consecutive sentences based on its findings the crimes committed in counts 5, 20, 22, and 24 and their objectives were predominantly independent of each other and committed on different days several months apart. These findings are identified in California Rules of Court, rule 4.425(a)(1) and (3) as “[c]riteria affecting the decision to impose consecutive rather than concurrent sentences.” Tillotson does not challenge the sufficiency of the evidence supporting the trial court’s findings under rule 4.425(a)(1). Thus, the trial court did not err by imposing consecutive sentences on counts 5, 20, 22, and 24.

### III. *Calculation of Presentence Custody Credit*

The trial court deferred to the Department of Corrections and Rehabilitation to calculate Tillotson’s presentence custody credit. At the sentencing hearing after remand, the trial court asked whether counsel knew the number of days of presentence custody credit to which Tillotson was entitled. Her counsel responded: “No, Your Honor, because, of course, she’s been in state prison for a lengthy time. So they have their own calculations.” The court then stated: “That’s fine. If counsel are both satisfied with that, then that will be the credits.” The court’s minute order of April 24, 2008 includes this entry: “Department of Corrections is to calculate additional credits.”

The Attorney General agrees with Tillotson that the trial court, not the Department of Corrections and Rehabilitation, must calculate the number of days of presentence custody credit. (See *People v. Buckhalter* (2001) 26 Cal.4th 20, 29, 37.)

Penal Code section 2900.1 provides: “Where a defendant has served any portion of h[er] sentence under a commitment based upon a judgment which judgment is subsequently declared invalid or which is modified during the term of imprisonment, such time shall be credited upon any subsequent sentence [s]he may receive upon a new commitment for the same criminal act or acts.”

We remand with directions to the trial court to calculate the number of days of presentence custody credit to which Tillotson is entitled.

#### IV. *Total Jail Time*

In *People v. Tillotson*, *supra*, 157 Cal.App.4th at page 537, we concluded: “The judgment as to count 23 therefore is modified to reflect a conviction for an attempted violation of Penal Code section 166, subdivision (a)(4). As modified, the judgment as to count 23 is affirmed, except for sentencing. On remand, Tillotson is to be resentenced on count 23.”

At the sentencing hearing after remand, the trial court stated as to count 23: “I’ll change that to a 90-day jail concurrent time concurrent with any other time imposed in this case.” The court’s minute order sentences Tillotson to a jail term of 180 days on counts 2, 3, 9, 13, and 21, and to a jail term of 90 days on count 23, for a total jail time of 270 days. The minute order includes an entry stating: “Jail sentence to run concurrent with State Prison Sentence.”

Tillotson argues that in light of the trial court’s oral comments, the 90-day sentence on count 23 must run concurrently to the 180-day jail sentence on counts 2, 3, 9, 13, and 21, for a total jail time of 180 days. The Attorney General does not argue the point, but states, “[o]n remand, the trial court can also address and remedy appellant’s claim regarding imposition of jail time for the misdemeanor conviction of violating a restraining order in Count 23.”

From the trial court’s oral comments at the sentencing hearing, it is unclear whether the court intended the 90-day jail sentence on count 23 to run concurrent with

other jail time (which then runs concurrent to the prison sentence), or consecutive to other jail time but concurrent to the prison sentence. On remand, the court may clarify its intent and modify the judgment and abstract of judgment if necessary.

#### DISPOSITION

The matter is remanded with directions to the trial court to:

1. Modify the judgment by striking the three-year enhancement under Health and Safety Code section 11370.2, subdivision (c) as to count 24.
2. Calculate presentence custody credit and modify the judgment accordingly.
3. Clarify whether the 90-day jail sentence on count 23 is to run consecutively to or concurrently with the 180-day jail sentence on counts 2, 3, 9, 13, and 21, and modify the judgment and abstract of judgment if necessary.
4. Prepare a corrected and/or modified abstract of judgment and forward a certified copy of it to the Department of Corrections and Rehabilitation.

In all other respects, the judgment is affirmed.

FYBEL, J.

WE CONCUR:

MOORE, ACTING P. J.

ARONSON, J.